No. 137, Original

In the Supreme Court of the United States

STATE OF MONTANA, PLAINTIFF

v.

STATE OF WYOMING
AND
STATE OF NORTH DAKOTA

ON MOTION TO DISMISS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO THE MOTION TO DISMISS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
WILLIAM M. JAY
Assistant to the Solicitor General
JAMES DUBOIS
K. JACK HAUGRUD
KEITH SAXE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID L. BERNHARDT
Solicitor
JOHN MUDDOCK
Attorney
Department of the Interior
Washington, D.C. 20240

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 8
Argument:
I. The Compact affords pre-1950 users a limited right to redress for injury to pre-1950 water uses 9
A. Article V(A) of the Compact protects first-tier rights against encroachment by second- and third-tier rights 10
B. Montana's claim may proceed only under Article V(A) 20
II. Montana has adequately pleaded a claim for redress of its pre-1950 rights 22
A. Article V(A) gives Montana's pre-1950 rights priority over all post-1950 diversions, including storage and irrigation of new acreage 22
B. Removing water from the Yellowstone River System using groundwater wells is a cognizable diversion 23
C. More efficient use of water by Wyoming's pre-1950 users does not violate the Compact .. 29
Conclusion 33
Appendix A — Engineering Committee Report (Oct. 23, 1950) 1a
Appendix B — Yellowstone River Compact Commisson Minutes (Oct. 24-25, 1950) 5a

TABLE OF AUTHORITIES

Cases: Page

Arizona v. *California*:
292 U.S. 341 (1934) 11, 13
298 U.S. 558 (1936) 5
Barnhart v. *Thomas*, 540 U.S. 20 (2004) 25
Bell Atl. Corp. v. *Twombly*, 127 S. Ct. 1955 (2007) 9
Binning v. *Miller*, 102 P.2d 54 (Wyo. 1940) 30, 31
Bower v. *Big Horn Canal Ass'n*, 307 P.2d 593 (Wyo. 1957) 30
Commissioner v. *Lundy*, 516 U.S. 235 (1996) 12
General Dynamics Land Sys. v. *Cline*, 540 U.S. 581 (2004) 12
Jama v. *ICE*, 543 U.S. 335 (2005) 25
Kansas v. *Colorado*:
514 U.S. 673 (1995) 10, 28
543 U.S. 86 (2004) 28
Kansas v. *Nebraska*:
530 U.S. 1272 (2000) 27, 28
540 U.S. 964 (2003) 28
Nebraska v. *Wyoming*, 515 U.S. 1 (1995) 21
Ohio v. *Kentucky*, 410 U.S. 641 (1973) 14
Oklahoma v. *New Mexico*, 501 U.S. 221 (1991) ... 10, 11, 13
Smith v. *Duff*, 102 P. 984 (Mont. 1909) 27
Texas v. *New Mexico*, 482 U.S. 124 (1987) 10, 11
Virginia v. *Maryland*, 540 U.S. 56 (2003) 12
Winters v. *United States*, 207 U.S. 564 (1908) 1
Wyoming v. *Colorado*, 259 U.S. 419 (1922) 17

Case—Continued: Page

Zicherman v. *Korean Air Lines Co.*, 516 U.S. 217 (1996) 13

Constitution, statutes and rule:

U.S. Const. Art. I, § 10, Cl. 3 (Compact Clause) 4
Act of June 14, 1932, ch. 253, 47 Stat. 306 4
Act of June 2, 1949, ch. 166, 63 Stat. 152 ..... 2, 12
Colorado River Compact, 70 Cong. Rec. 325 (1928) 19
Art. III(a), 70 Cong. Rec. 325 19
Art. III(d), 70 Cong. Rec. 325 19
Upper Colorado River Basin Compact, ch. 48, 63 Stat. 31 19
Art. III(a)(2), 63 Stat. 33 19
Yellowstone River Compact, ch. 629, 65 Stat. 663 ..... 2, 4
Preamble, 65 Stat. 663 ..... 4, 12, 26
Art. II(D), 65 Stat. 664 ..... 4, 24, 26
Art. II(E), 65 Stat. 664 4
Art. II(F), 65 Stat. 665 ..... 2, 5
Art. II(G), 65 Stat. 665 ..... 24, 25
Art. III(A), 65 Stat. 666 6
Art. III(C), 65 Stat. 665 6
Art. III(E), 65 Stat. 666 6
Art. III(F), 65 Stat. 666 6
Art. V, 65 Stat. 666 ..... 2, 28
Art. V(A), 65 Stat. 666 ..... *passim*
Art. V(B), 65 Stat. 666 ..... *passim*
Art. V(C), 65 Stat. 667 ..... *passim*
Art. V(C)(1), 65 Stat. 667 24

Statute and rule—Continued: Page

Art. V(C)(2), 65 Stat. 667 21
Art. V(C)(3), 65 Stat. 667 23
Art. V(D), 65 Stat. 667 6
Art. V(E), 65 Stat. 667 5
Art. VI, 65 Stat. 668 6
Art. VII, 65 Stat. 668 6
Art. VIII, 65 Stat. 668 6
Art. IX, 65 Stat. 668 6
Art. X, 65 Stat. 669 6
Art. XI, 65 Stat. 669 6
Fed. R. Civ. P. 12(b)(6) 9

Miscellaneous:

H.R. Rep. No. 1118, 82d Cong., 1st Sess. (1951). 15, 32
S. Rep. No. 883, 82d Cong., 1st Sess. (1951) 14, 15, 16, 30, 32
Samuel C. Wiel, *Water Rights in the Western States* (3d ed. 1911) 18, 27, 31

In the Supreme Court of the United States

No. 137, Original

STATE OF MONTANA, PLAINTIFF

v.

STATE OF WYOMING
AND
STATE OF NORTH DAKOTA

ON MOTION TO DISMISS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO THE MOTION TO DISMISS

INTEREST OF THE UNITED STATES

Wyoming's Motion to Dismiss presents several questions concerning the Yellowstone River Compact (Compact), an interstate agreement negotiated with federal participation, approved by Congress, and possessing the status of federal law. The United States administers water projects throughout the Yellowstone River Basin that may be affected by the Court's construction of the Compact. Pursuant to *Winters* v. *United States*, 207 U.S. 564 (1908), the United States also holds certain rights to waters of the Yellowstone River system in trust for the Indian Tribes whose reservations lie in the river basin. At the Court's invitation, the United States filed a brief addressing Montana's motion for leave to file a bill of complaint.

STATEMENT

The Compact is an agreement among Wyoming, Montana, and North Dakota. See Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 (approving and reprinting the Compact).[1] The Compact allocates the water supply of the Yellowstone River system among those States. Art. V, 65 Stat. 666-668. Montana alleges that Wyoming has breached the Compact by taking water to which Montana is entitled from the Tongue and Powder Rivers, tributaries of the Yellowstone that flow from Wyoming into Montana. Compl. ¶¶ 9-13; Br. in Supp. of Compl. 19.

1. The Yellowstone River Basin is an approximately 70,100-square-mile watershed encompassing parts of Wyoming, Montana, and North Dakota. The mainstem of the Yellowstone River rises in the Wyoming portion of Yellowstone National Park, flows north into Montana, crosses Montana in a northeasterly direction, and joins the Missouri River just across the North Dakota border. Because most of the mainstem lies within Montana, interstate water disputes principally involve the tributaries that rise in Wyoming and cross into Montana before joining the mainstem.

This litigation involves only two of those interstate tributaries, the Tongue and Powder Rivers. Each rises in Wyoming's Bighorn Mountains. The Tongue flows approximately 225 miles northeast to its confluence with the Yellowstone near Miles City, Montana, and its basin covers approximately 5400 square miles. The Powder flows roughly north for approximately 500 miles and joins the Yellowstone at Terry, Montana; its basin encompasses approximately 13,200 square miles. The principal use of water diverted from both rivers is for

---

[1] The text of the Compact is appended to Montana's bill of complaint.

irrigation within Wyoming and Montana. The Tongue serves as the primary water source for the Northern Cheyenne Indian Reservation, which is adjacent to the river in south-central Montana.

The other interstate tributaries of the Yellowstone River that are regulated by the Compact are the Bighorn River (except for its tributary the Little Bighorn River) and the Clarks Fork Yellowstone River. Art. II(F), 65 Stat. 665. The Bighorn River (known as the Wind River for part of its upper reaches) rises in Wyoming and meets the Yellowstone in Montana. The principal use of the waters diverted from that tributary in both States is for irrigation; much of the irrigation use in Wyoming is through Bureau of Reclamation projects. Bighorn Reservoir, one of several federal reservoirs in the Bighorn River Basin, straddles the state line and is surrounded by the Bighorn Canyon National Recreation Area. The Crow Indian Reservation and the Wind River Reservation are also located in the Bighorn drainage.[2] The 150-mile Clarks Fork rises in southern Montana, runs south into Wyoming, then flows back into Montana to its confluence with the Yellowstone. Although no compact violation is alleged regarding the Bighorn or Clarks Fork, the water rights and administration in those river basins may be affected by any compact interpretation established in this litigation.

2. The Compact is the product of nearly 20 years of intermittent negotiations, authorized by Congress with the goal of reaching "an equitable division and apportionment * * * of the water supply of the Yellowstone River" and its tributaries. Act of June 2, 1949, ch. 166,

---

[2] Under the *Winters* doctrine, the United States holds reserved water rights in trust for the Tribes. See p. 1, *supra*.

63 Stat. 152-153; Act of June 14, 1932, ch. 253, 47 Stat. 306; see Wyo. Br. in Supp. of Mot. to Dismiss 12-17 (Wyo. Br.); Mont. Br. in Response to Wyo. Mot. to Dismiss 2-3 (Mont. Br.). The three States reached agreement on December 8, 1950, and the resulting Compact was subsequently ratified by the state legislatures and approved by Congress in accordance with the Compact Clause of the Constitution, Art. I, § 10, Cl. 3. See Act of Oct. 30, 1951, 65 Stat. 663.

In fulfillment of Congress's goal, the Compact provides for the division of the Yellowstone River Basin's water supply. The preamble declares that the Compact is intended to "remove all causes of present and future controversy between said States * * * with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park." 65 Stat. 663. The preamble further states that the parties "desire[] to provide for an equitable division and apportionment of such waters," and that they acknowledge that "the great importance of water for irrigation" shall be recognized "in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin." *Ibid.* The Compact governs the waters of the entire Yellowstone River System, defined as "the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone," except the streams within Yellowstone National Park. Art. II(D), 65 Stat. 664. Although "[t]ributar[ies]" include "any stream which in a natural state contributes to the flow of the Yellowstone River," Art. II(E), 65 Stat. 664, the Compact principally regulates the waters of the four "Interstate Tributar-

ies," *i.e.*, the Tongue, Powder, Clarks Fork Yellowstone, and Bighorn Rivers. Art. II(F), 65 Stat. 665.[3]

The operative provision, Article V, provides for the division of water between Montana and Wyoming according to a three-tiered framework. Article V(A) sets out the first tier: it provides that "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." 65 Stat. 666. The latter doctrine provides that a person who diverts water and puts it to a beneficial use retains the right to use that water, on a "first in time, first in right" basis, although only to the extent the water is reasonably required and actually used. See, *e.g.*, *Arizona* v. *California*, 298 U.S. 558, 565-566 (1936).

Article V(B) sets out the second and third tiers. 65 Stat. 666. Of the water of the interstate tributaries that is "unused and unappropriated" as of January 1, 1950, the second-tier allocation permits each State to divert water necessary to supplement its first-tier rights. Those supplemental rights, too, are to be acquired and used pursuant to the doctrine of appropriation. *Ibid.* The third-tier allocation gives each State a specified percentage of any remaining "unused and unappropriated" water in each of the four interstate tributaries. Art. V(B), 65 Stat. 666-667. The quantity of water available to third-tier uses in each river and the amounts actually diverted by each State are to be calculated annually. Art. V(C), 65 Stat. 667.

---

[3] Water for domestic use and (in moderate amounts) for watering livestock is excluded from the Compact altogether. Art. V(E), 65 Stat. 667.

The Compact creates a Yellowstone River Compact Commission to administer the Compact as between Montana and Wyoming. (North Dakota does not participate in the Commission.) The Commission includes one representative from each of the two States and a federally appointed chairman, who has no vote except in case of tie votes on certain core matters. Art. III(A) and (F), 65 Stat. 665, 666. The Commission's jurisdiction includes the "collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to [the signatory] States upon matters connected with the administration of this Compact." Art. III(C), 65 Stat. 665. The Commission also may formulate rules and regulations necessary to carry out the Compact's provisions. Art. III(E), 65 Stat. 666. Historically the Commission has not served as a forum for resolving water-rights disputes.

The present controversy relates principally to the operative provisions in Article V(A), (B) and (C) of the Compact. Article V(D), regulating the respective rights of Montana and North Dakota in the mainstem of the Yellowstone, is not implicated, nor are the rights and limitations set out in Articles VI through XI. Article VI, however, does serve effectively to exclude Indian water rights from the scope of the present dispute between Montana and Wyoming. Article VI provides that "[n]othing contained in th[e] Compact shall be so construed or interpreted as to affect adversely the use of any rights to [Yellowstone River System waters] owned by or for Indians." Art. VI, 65 Stat. 669; see also U.S. Invitation Br. 8 n.3 (explaining possible implications for the Northern Cheyenne).

3. Montana alleges that in some recent years, there has been insufficient water available in the Powder and Tongue Rivers to satisfy pre-1950 water rights in Montana under the Compact's first tier. Compl. ¶¶ 14-16; Br. in Supp. of Compl. 14, 17. Montana further alleges that while its pre-1950 users have been short, Wyoming has permitted upstream diversions from these two interstate tributaries to post-1950 uses. Montana contends that when Montana's first-tier rights are not satisfied, there is no "unused and unappropriated" water to be allocated between the States pursuant to the Compact's second and third tiers, and that in those circumstances diversions in Wyoming for post-1950 use violate the Compact.

Montana specifies four categories of post-1950 uses into which the allegedly impermissible diversions fall. First, Montana asserts that new storage reservoirs have been built and used in the Wyoming portion of the Powder and Tongue basins since 1950. Compl. ¶ 9. Second, Montana alleges that new acreage in Wyoming has been put under irrigation since 1950. *Id.* ¶ 10. Third, Montana alleges that groundwater pumping in Wyoming for irrigation and other uses, including coalbed methane production, has reduced flows in the Tongue and Powder basins. *Id.* ¶ 11; Mont. Br. 51. Fourth, Montana alleges that Wyoming water users have increased their consumption on existing acreage by implementing new irrigation methods that result in less water making its way back to the stream as return flows. Compl. ¶ 12; Br. in Supp. of Compl. 15-16.

4. This Court granted Montana leave to file its complaint, and invited Wyoming to submit the instant motion to dismiss. 128 S. Ct. 1332 (2008).

SUMMARY OF ARGUMENT

Article V(A) provides federally enforceable protection for the water rights that existed in Wyoming and Montana as of 1950. The text and history of the Compact show that these first-tier rights were to be preserved inviolate, without expansion or contraction. The Compact provides that the "existing" water rights "shall continue to be enjoyed" following the Compact's enactment, consistent with the state-law appropriation doctrines that created them. Art. V(A), 65 Stat. 666. And the Compact permits more junior, post-1950 diversions only if the water diverted is "unused and unappropriated." Art. V(B), 65 Stat. 666. The essence of Montana's claim is that when Montana's first-tier users are short, there is no "unused and unappropriated" water, and the "appropriated" water must flow to the pre-1950 users who appropriated it.

Montana's basic claim is correct, but Montana's right to redress under this provision is a limited one, for it depends on showing that its own pre-1950 users are receiving insufficient water *and* that users in Wyoming are diverting water to post-1950 uses. That limited right is consistent with the simple and straightforward function of Article V(A), which preserves and protects pre-1950 rights just as they existed in each State. Wyoming's position—that pre-1950 rights received no protection *at all* under the Compact—cannot be squared with the text and history of Article V(A).

Montana also pleads facts that, if proven, would show a Compact violation. Montana alleges that waters to which its own first-tier users are entitled are instead being diverted to several specific post-1950 uses in Wyoming, *i.e.*, storage, irrigation of new acreage, and groundwater pumping for irrigation or industrial use.

Montana also suggests that decreasing the *return* flows from water that was already diverted to irrigation before 1950 is a post-1950 use; that assertion fails, because the Compact preserves pre-1950 Wyoming users' state-law right to use all of the water they diverted, so long as the use (irrigation of the identical acreage) remains the same. But because Montana's three remaining allegations are sufficient to state a claim for violation of Article V(A), the motion to dismiss should be denied.

ARGUMENT

Pursuant to this Court's order inviting Wyoming's motion, the applicable standard is drawn from Rule 12(b)(6) of the Federal Rules of Civil Procedure. Montana must present "[f]actual allegations" sufficient "to raise a right to relief above the speculative level, on the assumption that all the [factual] allegations in the complaint are true." *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1965 (2007) (citations omitted). Montana satisfies that standard.

I. THE COMPACT AFFORDS PRE-1950 USERS A LIMITED RIGHT TO REDRESS FOR INJURY TO PRE-1950 WATER USES

The text, structure, and history of the Compact together establish that Article V(A) protects the water rights being put to beneficial use before 1950 against subsequent new diversions.[1] That reading compels the conclusion that Montana may bring an action to enforce its rights under Article V(A) if its citizens' pre-1950 water rights are infringed.

---

[1] Montana's allegations do not yet require the Court to determine whether rights recognized under state law in 1950, but not then being put to beneficial use, are protected. See note 12, *infra*.

Montana's suggestion that it can proceed in the alternative under a different theory, relying on Article V(B), appears not to be properly presented, and rests in any event on a flawed assumption about Article V(B)'s operation. The United States' position that the motion to dismiss should be denied turns entirely on the conclusion that Montana has stated a claim under Article V(A).

A. Article V(A) Of The Compact Protects First-Tier Rights Against Encroachment By Second- And Third-Tier Rights

1. The plain text of the Compact specifies that pre-1950 water rights "shall continue to be enjoyed in accordance with * * * the doctrine of appropriation." Art. V(A), 65 Stat. 666. The clear import of that language is that neither State may interfere with the other's continued enjoyment of its existing appropriative rights, and that post-1950 diversions may come only from unused and unappropriated waters. But on Wyoming's reading, Montana's continued enjoyment of those pre-1950 rights could be disrupted at will by post-1950 users in Wyoming. That reading runs contrary to the Compact itself.

Wyoming does not rely on the text of Article V(A), but asserts instead that the negotiating history supports its position. Although the materials on which Wyoming relies may properly be considered in appropriate circumstances, all are secondary to the Compact's text. The Compact is not only an agreement among the three State parties, but also a law of the United States. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987). As with other federal laws, if the text, read in light of its context, is unambiguous, it is conclusive. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. 673, 690 (1995) ("We conclude that

the clear language of [the Arkansas River Compact] refutes Colorado's legal challenge."). If the Court finds the text ambiguous, it may also consider other reliable documentary indicia of the intent of Congress and the parties, including materials submitted to Congress in support of congressional approval. See *Oklahoma* v. *New Mexico*, 501 U.S. at 235 n.5; *Texas* v. *New Mexico*, 462 U.S. 554, 568 n.14 (1983); *Arizona* v. *California*, 292 U.S. 341, 359-360 (1934).

In this case the best reading of the text contradicts Wyoming's position that Article V(A) creates no enforceable rights. That Article provides that pre-1950 appropriative rights to the beneficial use of water existing in each State "shall continue to be enjoyed" under the laws implementing the appropriation doctrine. 65 Stat. 666. Wyoming reads Article V(A) "to carve * * * pre-1950 rights out of the rest of the Compact" altogether. Wyo. Br. 21. But the Compact uses the operative term ("enjoyed") in a mandatory way ("shall continue") that is bound up with the Compact's allocation of the Yellowstone System's waters. Article V(B), which creates the second tier of Compact water rights (*i.e.*, rights supplemental to the first tier), uses essentially the same language as Article V(A): the rights in question are "to be * * * enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." 65 Stat. 666. Those second-tier rights are affirmatively "allocated" by the Compact between Montana and Wyoming. *Ibid.* This repetition of the term "enjoyed" in a provision that is plainly a substantive allocation, not a carveout, reinforces the conclusion that the phrase "shall continue to be enjoyed" in Article V(A) similarly serves a substantive role, because identical terms used in adjacent sections of the same statute

customarily are given the same meaning, see, *e.g.*, *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996). Hence, the inclusion of the phrase "shall continue to be enjoyed" in Article V(A) affords pre-1950 rights at least some federally enforceable protection from infringement.

The preamble of the Compact supports that interpretation. The preamble recites that the signatory States "desir[ed] to *remove all causes of present and future controversy* between said States and between persons in one and persons in another with respect to *the waters of the Yellowstone River and its tributaries*, * * * and desir[ed] to provide for an equitable division and apportionment of *such waters*." 65 Stat. 663 (emphases added). The preamble supports reading the Compact to address all rights to waters of the Yellowstone System, rather than to exclude the set of rights existing as of January 1, 1950, and leave them subject only to state law that potentially offers no interstate redress. Cf. *Virginia* v. *Maryland*, 540 U.S. 56, 68-69 (2003) (using preamble of interstate compact as interpretive aid); *General Dynamics Land Sys.* v. *Cline*, 540 U.S. 581, 589-590 (2004) (using federal statute's statement of purpose as interpretive aid).[5]

The Compact's text also contradicts Wyoming's related argument (Br. 44) that because the Compact measures compliance on an annual basis, "Wyoming cannot violate the Compact based on some daily comparison of rights on either side of the state line." The Compact's specification that determinations be made "on an annual water year basis" applies only to "[t]he quantity of water subject to the percentage allocations," *i.e.*, to the *third-*

[5] The task specified by Congress for the negotiators—to reach "an equitable division and apportionment * * * of the water supply"—supports the same interpretation. Act of June 2, 1949, 63 Stat. 153.

tier water rights that Article V(B) allocates by percentages. Art. V(C), 65 Stat. 667. By contrast, first-tier rights are to be enjoyed "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Art. V(A), 65 Stat. 666. The latter doctrine contains no such principle of annual computation. Thus, although Wyoming is correct that allegations of excessive diversion of third-tier water by one State as against third-tier rights of the other State must be based on annual calculations, see pp. 20-21, *infra*, that annual-accounting principle is not present in Article V(A).

2. The history of the Compact's negotiation, approval, and ratification confirms what the text of the Compact indicates: *viz.*, that Article V(A) affords substantive protection for first-tier rights against infringement by post-1950 diversions. The Congress that approved the final text, the Executive Branch that recommended its approval, and the parties that negotiated it all appear to have shared the understanding that pre-Compact rights would be genuinely protected. Wyoming's current interpretation is contrary to that documented understanding.

a. Wyoming and Montana agree generally that negotiating history is relevant in interpreting the Compact's text. Wyo. Br. 38-39; Mont. Br. 15; see *Oklahoma* v. *New Mexico*, 501 U.S. at 235 n.5; *Arizona* v. *California*, 292 U.S. at 359-360; cf. *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (applying the same principle to treaty interpretation). Montana suggests, however (Br. 19-23), that some aspects of the negotiating history are not properly considered at this stage, and that the motion to dismiss should be denied for that reason. Montana's suggestion is not well taken. In par-

ticular, the contents of the Engineering Committee Report excerpted in the appendix to Wyoming's brief (and set forth in full at App., *infra*, 1a-4a) do not appear controvertible, as the compact-negotiation minutes demonstrate. See *id.* at 7a-9a (minutes memorializing state representatives' receipt and discussion of Engineering Committee Report); see also S. Rep. No. 883, 82d Cong., 1st Sess. 2 (1951) (noting that official versions of Compact minutes were filed with the appropriate federal agency, and that "most of the questions [were] answered" by the Engineering Committee). Even if the commissioners did not adopt the full Report, there was no dispute over its content.

In any event, whatever the merits of Montana's objections to particular documents, the mere fact that Wyoming has submitted (or excerpted) such documents should not automatically move the case into a summary-judgment posture, as under the Federal Rules. See *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973) (stating that this Court's "object in original cases is to have the parties, as promptly as possible, reach and argue the merits," and thus to dispose of antecedent legal questions at the earliest stage "feasible").

b. The negotiating history clearly indicates that the federal government understood the Compact to be protecting first-tier rights. Upon submitting the draft to Congress for ratification, the Executive Branch communicated its view that the proposed Compact "recognizes the [existing] appropriative rights * * * and it permits the continued enjoyment of such rights," while Article V(B) allocates only the waters "residual after the enjoyment of the rights in [Article V(A)]." S. Rep. No. 883, *supra*, at 11 (reprinting report of the Secretary of the Interior). Reports of both relevant congressional com-

mittees were in accordance with that view. See *id.* at 2 (pre-1950 rights "are recognized");[6] H.R. Rep. No. 1118, 82d Cong., 1st Sess. 2 (1951) (Article V(A) "recognizes the appropriative rights" existing in 1950). Although it was understood that "a demand of one State upon another for a supply *different from that now obtaining* under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing," S. Rep. No. 883, *supra*, at 2 (emphasis added), a demand to enforce rights to the "supply * * * now obtaining" is another matter.

The negotiating history further confirms that the States shared this understanding. As Wyoming notes, the drafters agreed that pre-1950 rights would not be administered under the Compact on an interstate priority basis—meaning that, for example, a downstream Montana user with a 1930 water right would not be entitled to strict priority over an upstream Wyoming user with a 1940 water right. See Wyo. Br. 12-13, 21, 42. And the drafters did not seek to *reallocate* between the two States water that had already been appropriated by 1950. See App., *infra*, 2a (Engineering Committee Report); *id.* at 11a (Compact Commission minutes). Thus, the federal representative explained to Congress, "the agreement sought on *division* of waters" would not "include the water now appropriated and in use." S. Rep. No. 883, *supra*, at 6 (emphasis added). But the drafters also manifested broad agreement that existing rights would be recognized, as they had been created, under the doctrine of appropriation. See, *e.g.*, App., *infra*, 14a ("Mr. Burke [a federal representative] stated that there

---

[6] The Senate Report was signed by Senator Joseph O'Mahoney of Wyoming, who chaired the committee. See S. Rep. No. 883, *supra*, at 1.

seemed to be no question about recognizing existing rights, that the question was what body would enforce those rights, the Courts or a Compact Commission.").

3. Wyoming contends (Br. 40-42) that the principal lesson of the Compact's history and context is that the drafters chose to base the agreement on a modified "divertible flow" principle rather than on a "depletion" principle. A divertible-flow compact allocates shares of the water that is available for diversion during the period of measurement (which in the final Compact is one year, but in previous drafts was a single day). Each State may take a specified percentage of the available water, so the volume actually diverted depends on the volume available in the river. The depletion principle, by contrast, specifies the actual volume or percentage of available water supply that each state may actually consume during the period—and therefore the quantity, but not necessarily the flow, that the upstream State must leave in the river for the downstream State's use. *Id.* at 10-11. Wyoming contends that Montana is demanding delivery of a specified quantity of water for pre-1950 uses and that the Compact's adoption of the divertible-flow principle forecloses that argument. *Id.* at 42.

The history that Wyoming cites, however, shows that the drafters adopted a modified divertible-flow principle only in making the "allocation of the *unused* waters of the Yellowstone River," which principally means the third-tier water apportioned by Article V(B) and (C). Wyo. App. 61-62 (emphasis added); App., *infra*, 14a-15a. The Interior Secretary's report makes the same point: "*In paragraph C of article V*, there is adopted a modified version of the divertible flow principle." S. Rep. No. 883, *supra*, at 11 (emphasis added). Thus, the rejection of the depletion principle appears not to be significant to

the protection of first-tier rights under Article V(A), which is governed by "the doctrine of appropriation," 65 Stat. 666.

a. The doctrine of appropriation is therefore the background principle that is most relevant to the question presented in this case, *i.e.*, what recourse downstream pre-1950 water users have during times of shortage, when not enough water comes downstream to satisfy their appropriative rights. Under the doctrine of appropriation, as a general matter:

> The diversion from the stream and the application of the water to a beneficial purpose constituted an appropriation, and the appropriator was treated as acquiring a continuing right to divert and use the water to the extent of his appropriation, but not beyond what was reasonably required and actually used. This was deemed a property right and dealt with and respected accordingly. As between different appropriations from the same stream, the one first in time was deemed superior in right.

Wyoming v. *Colorado*, 259 U.S. 419, 459 (1922) (discussing Wyoming and Colorado law).

The doctrine of appropriation was prompted by necessity. As this Court has recognized, flows in western streams and rivers vary greatly over the year. Heavy winter snowfall in the mountains melts in the late spring and early summer, producing high flows in May, June, and July, but lower flows in other months. *See, e.g.*, *Wyoming* v. *Colorado*, 259 U.S. at 457-458. Because irrigation is essential to western agriculture, *see ibid.*, access to irrigation water during the low-flow periods is critically important. Water rights under the doctrine of appropriation are not simply a matter of annual volume of water; in times of shortage when demand exceeds the

flow of a river, the doctrine allocates stream flow by priority of appropriation. See, *e.g.*, 1 Samuel C. Wiel, *Water Rights in the Western States* § 301, at 311 (3d ed. 1911) ("In times of natural or other deficiency * * * the prior appropriator may still claim his full amount * * *. This is true even where (indeed, especially where) unusual scarcity or dry season causes the deficiency.").

As explained above, the Compact does not adopt the rule of strict interstate priority as among pre-1950 Montana users and pre-1950 Wyoming users, creating a single integrated priority among users in the two States. See p. 15, *supra*.[7] But if Article V(A)'s retention of "the doctrine of appropriation" as the governing law is to have any meaning, it must give *pre*-1950 Montana users priority over *post*-1950 Wyoming users. That priority is therefore enforceable under the Compact. Wyoming's contrary reading of the Compact would effectively leave pre-1950 users in Montana, the down-stream State, categorically unprotected against diversions by *all* junior users upstream (even those with a post-1950 priority).

b. Applying this principle here is fully consistent with the drafters' choice of the modified divertible-flow principle. To the extent that principle is even relevant to the interpretation of Article V(A), it establishes only

---

[7] There is no occasion here for the Court to decide whether—although the Compact itself does not impose an interstate priority of pre-1950 rights in the two States—the Compact would preclude the Court, in the exercise of its original jurisdiction, from apportioning water to afford some protection for pre-1950 Montana users as against pre-1950 Wyoming users in a time of shortage. Montana has not sought any such relief in this case.

that Montana's recourse under that provision is limited to the actual protection of valid pre-1950 rights.

The "depletion" theory that was considered during the compact negotiations was based on one used in the Upper Colorado River Basin Compact, see Act of Apr. 6, 1949, ch. 48, 63 Stat. 31, to which Wyoming, but not Montana, is a party. App., *infra*, 8a, 14a. Under the Upper Colorado Compact, each State in the Upper Basin is allocated a quantity of water each year for consumptive uses in each State.[*] Upper Colorado Compact Art. III(a)(2), 63 Stat. 33. The depletion theory is applied annually and does not guarantee any set flow at any given time, only an annual volume of water to be delivered to, and consumable by, each State. See p. 16, *supra*. The "divertible flow" theory, by contrast, allocates and administers water on the basis of a right to divert a *percentage* of each river (not a particular quantity). See Wyo. App. 17-19 (1942 draft compact). The Engineering Committee modified the divertible-flow principle to use annual administration (whereas an unmodified divertible-flow principle would use daily administration, which is much more difficult in practice). App., *infra*, 2a-3a.

Montana's claim does not depend upon adopting the depletion principle that the Compact's drafters rejected. Wyoming's argument would have some purchase if Montana were arguing for delivery of a fixed quantity of water. See Wyo. Br. 42. But Montana is arguing that its pre-1950 users are sometimes short of water at times

---

[*] The fixed quantities are based on percentages of the 7.5 million acre-feet per year that are allocated to the Upper Basin, with certain limitations, by the (pre-existing) Colorado River Compact. See Upper Colorado Compact, Art. III(a)(2), 63 Stat. 33; Colorado River Compact Art. III(a) and (d), 70 Cong. Rec. 325 (1928).

when Wyoming's post-1950 users are diverting water. Mont. Br. 42. Wyoming is not obliged to deliver a fixed quantity of water to Montana, because when first-tier users in Montana are short, Wyoming has no obligation under the Compact to curtail its own pre-1950 diversions. And Wyoming is not capped in the amount of water that it can consume when Montana's first-tier users *are* adequately supplied; at those times the only limits are Article V(B)'s percentage allocations of third-tier water. But Wyoming may not divert water lawfully appropriated by Montana's first-tier users and give it to second- or third-tier users in Wyoming (who by definition may use only "unused and unappropriated" water). That proposition has nothing to do with the drafters' choice of divertible flow over depletion as the basis for allocating third-tier water.

B. Montana's Claim May Proceed Only Under Article V(A)

Montana suggests, for the first time, that the motion to dismiss should be denied in any event, on the theory that even if Wyoming is not violating Montana's pre-1950 rights, it is (or may be) violating *post*-1950 rights. See Mont. Br. 17-18, 38-39, 44. To the extent that Montana seeks to introduce a new, freestanding allegation that Wyoming is consuming more than its percentage share under Article V(B) and (C), that allegation would not be appropriately introduced at this stage of the litigation.[9] In any event, Montana's contention appears to

---

[9] Montana's motion for leave to commence this action repeatedly asserted that Montana's first-tier rights under Article V(A) were at issue. Br. in Supp. of Compl. 17-20, 33; Br. in Supp. of Compl. App. A5; Mont. Reply Br. 2. As Montana recognizes (Br. 18), it is limited to the theory it advanced in seeking leave to file the action, unless it seeks and obtains leave to file an amended bill of complaint, which is sparingly

rest on the assumption that Article V(B) is violated whenever water that should go to a pre-1950 Montana user in fact goes to a post-1950 Wyoming user; that assumption is flawed, because the operation of Article V(B) turns on *annual* computation of divertible flows.

Montana would be correct in its assertion—that any infringement of first-tier rights is itself a violation of Article V(B)—only if Article V(B) involved daily computation. Under such a regime, if Wyoming diverted the vast majority of the flows of a tributary river for any day, giving some to pre-1950 uses and some to post-1950 uses—and if the amount left for Montana was not enough to satisfy all of Montana's pre-1950 users (leaving none at all for Montana's post-1950 users)—then Wyoming arguably would be in breach of Article V(A) *and* (B). That is so because Article V(C)'s formula excludes diversions for pre-1950 uses. As a result, in this example, Wyoming would be diverting 100% of the water not excluded from the computation—clearly exceeding its percentage allocation. But because the measurement period under Article V(C) is a full year, Wyoming's total annual diversions could remain within the percentage allocations even if during the peak irrigation season Wyoming were giving water to post-1950 users and leaving pre-1950 Montana users short. Therefore, not all violations of first-tier rights are necessarily also violations of the third-tier allocation.

---

granted in original actions. See *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995).

II. MONTANA HAS ADEQUATELY PLEADED A CLAIM FOR REDRESS OF ITS PRE-1950 RIGHTS

Wyoming contends in the alternative that even if Article V(A) creates enforceable rights, Montana's complaint fails to plead a cognizable injury to those rights. Montana alleges that Wyoming is infringing its rights under the Compact in four separate ways. Compl. ¶¶ 9-12. Thus, for Wyoming's motion to succeed on this basis, it must establish that none of these four allegations is sufficient to state a claim upon which relief may be granted.

Montana's complaint sufficiently pleads cognizable injury to pre-1950 rights. The allegations that Wyoming has permitted new storage and irrigation of new acreage, and allowed the depletion of the Yellowstone System waters through groundwater pumping, state a claim under the Compact. Wyoming is correct that Montana does not state a claim by complaining about increased consumption of water on existing acreage; however, because Montana satisfies its pleading burden without depending on that allegation, Wyoming's argument on that point is not a sufficient basis on which to grant the motion to dismiss the complaint.

A. Article V(A) Gives Montana's Pre-1950 Rights Priority Over All Post-1950 Diversions, Including Storage And Irrigation Of New Acreage

Montana's first two factual allegations allege that Wyoming has violated Montana's first-tier rights by diverting water to post-1950 storage and to post-1950 irrigation, when that water was necessary to satisfy the appropriative rights of first-tier Montana users. Compl. ¶¶ 10-11. Wyoming objects (Br. 50-54) that these allegations do not make out a Compact violation.

These allegations are sufficient to state a claim if the Court agrees with Montana that Article V(A) does create enforceable rights. All Montana need allege is that, at a time when there is no "unused and unappropriated" water, Wyoming is making diversions to post-1950 uses, in violation of Montana's first-tier rights under the Compact. Montana has alleged two such post-1950 uses: storage and irrigation. (Storage in reservoirs built after 1950, and storage in then-existing reservoirs for post-1950 uses, count as post-1950 diversions under the Compact. See Art. V(C)(2) and (3), 65 Stat. 667.) Contrary to Wyoming's suggestion, Montana is not contending that the Compact forbids building new storage or irrigating new acreage, but rather that those uses must be achieved with "unused and unappropriated" second- and third-tier water, and that Wyoming has been diverting Montana's first-tier water to those uses.

B. Removing Water From The Yellowstone River System Using Groundwater Wells Is A Cognizable Diversion

Montana also alleges that Wyoming users have diverted first-tier water to various post-1950 uses by pumping groundwater "in violation of Montana's rights under Article V of the Compact." Compl. ¶ 11. Although Wyoming contends that the Compact does not regulate groundwater at all, Montana is correct that if pumping groundwater removes surface water from the Yellowstone River's covered tributaries, then the pumping is a diversion regulated by the Compact. Although the Compact does not apportion the two States' entire supply of groundwater, it also does not create a "groundwater exception" to its apportionment of all waters in the Yellowstone River System.

1. The "Yellowstone River System" comprises (with exceptions not relevant here) "the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River." Art. II(D), 65 Stat. 664. A "diversion" from the Yellowstone River System, in turn, is defined as "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken." Art. II(G), 65 Stat. 665. Any "diversion" from one of the interstate tributaries for irrigation, municipal, or industrial use is counted against the appropriate State's percentage allocation of third-tier water, unless the diversion is for a pre-1950 or supplemental use. Art. V(C)(1), 65 Stat. 667.

The plain text of the Compact encompasses diversions accomplished by pumping groundwater as well as diversions accomplished by directly diverting surface water through ditches or pumps. Any act that involves the "taking or removing of water" from a stream covered by the Compact is a regulated diversion. Art. II(G), 65 Stat. 665. There is no limitation based on the means or the directness of the diversion, only an exception for water returned directly to the channel. Accordingly, on the face of the Compact, if groundwater pumping that commenced after January 1, 1950, "remov[es]" water from an interstate tributary, then that pumping amounts to a second- or third-tier diversion. And for the reasons discussed above, such diversions are limited to "unused and unappropriated" water; the Compact forbids an upstream post-1950 user in Wyoming from causing a shortage to a pre-1950 user in Montana.

Contrary to Wyoming's insistence (Br. 60, 62), no specific reference to "groundwater" in the text of the Compact is necessary, especially given the Compact's capacious definition of "diversion." Nor is Montana's allegation inconsistent with the Compact's use of the terms "river" and "stream," *ibid.*, or with its incorporation of the divertible-flow method, because Montana's theory is that the pumping removes water from the surface flows of the interstate tributaries.

Wyoming (Br. 62) and amicus Anadarko (Br. 8) make much of the proviso that water is not "divert[ed]" if it is "returned directly into the channel of the Yellowstone River or of the tributary from which it is taken." Art. II(G), 65 Stat. 665. But this exception does not show that the underlying definition excludes water that is not taken directly from the channel. The prepositional phrase "from which it is taken" is most naturally read to modify the immediately preceding word "*tributary*," not the earlier noun "channel," for several reasons.

First, the "rule of the last antecedent" presumes that a "limiting clause or phrase" like this one "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Jama* v. *ICE*, 543 U.S. 335, 343 (2005) (quoting *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2004)). That presumption accords here with the natural reading: under the Compact, the third-tier allocation applies only to "waters of the Interstate tributaries," Art. V(B), 65 Stat. 666, so water subject to the third-tier interstate allocation will *always* be "taken" from one of the tributaries. Thus, the Compact's definite, unconditional reference to "the tributary from which [the water] is taken" makes logical sense.

Second, treating the exception for immediately returned flows as narrowing the notion of a "diversion"

would distort the Compact's meaning and coverage. The Compact makes manifest its purpose to apportion *all* of the waters of the Yellowstone River System, "including springs and swamps, from [the] source[] [of every Yellowstone tributary] to the mouth of the Yellowstone River." Art. II(D), 65 Stat. 664; see Pmbl., 65 Stat. 663. The stream flow that the Compact allocates thus comes from both surface-water runoff and groundwater discharge. Wyoming and Anadarko's reading would permit a State to drain headwater springs and swamps, and to contend that it was not thereby "remov[ing]" water from the *channel* of a compacted stream. The Compact's definition of the river system that it is apportioning refutes any notion that the drafters wrote in such a loophole.

Thus, the exception simply provides that a diversion will not be counted if the water is returned "directly" into the tributary from which it came (not into another tributary) or into the Yellowstone mainstem. The language of that exception should not be read as defining the general term "diversion" and defeating the Compact's expansive definition of that term. Rather, the modest limitation in the exception, which properly treats non-consumptive uses (such as hydroelectic power generation) as causing no net change in divertible flow, simply does not exclude groundwater from a definition that otherwise would cover it in appropriate circumstances.

2. Nothing in the history of the Compact or of water law suggests that the plain text of the "diversion" definition should be disregarded. Although the ownership of groundwater, standing alone, may have been unsettled at the time (see Anadarko Br. 6-7), the treatment of underground water *that made its way into a stream* was settled. Long before the Compact was negotiated, "scientific investigation ha[d] dispelled much of th[e] mys-

tery concerning the movement of underground water." 2 Wiel, *supra*, § 1082, at 1022. As a leading treatise put it in 1911:

> If, on the proof, the percolations are shown to be tributary to the spring or watercourse in a material degree, the loss of them causing a substantial diminution of the spring or watercourse, they are now treated as a component part of the watercourse, * * * and rights therein are not regarded as underground rights separate therefrom.
>
> * * * [Cases from several States] hold[] that percolations tributary to a stream are a part thereof, and cannot * * * be diverted from existing claimants on the stream, otherwise than the stream itself, on the surface, could.

Id. at 1023. Montana was among those jurisdictions. See, *e.g.*, *Smith* v. *Duff*, 102 P. 984, 986 (Mont. 1909) ("It must not be forgotten that the subsurface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules.").

As Montana demonstrates (Br. 50, 53), other compacts negotiated at comparable times have been construed to regulate groundwater. See, *e.g.*, First Report of the Special Master at 19-45, *Kansas* v. *Nebraska*, 530 U.S. 1272 (2000) (No. 126, Original) (concluding that the 1942 Republican River Compact restricts groundwater use without using the term "groundwater");[10] *Kansas* v.

---

[10] Nebraska excepted to the Special Master's conclusion, but this Court overruled its exceptions and denied the motion to dismiss. *Kansas* v. *Nebraska*, 530 U.S. 1272 (2000). The parties subsequently stipulated to the adoption of a mathematical model to calculate the

Colorado, 543 U.S. 86, 90-91 (2004) (detailing Special Master's similar conclusion with respect to the 1949 Arkansas River Compact). Although these other compacts differ textually and structurally from the Yellowstone River Compact and from one another, they demonstrate that interstate compacts can sensibly be read to encompass groundwater pumping that circumvents the compacts' allocation of surface water. First Report of the Special Master at 23-25, *Kansas* v. *Nebraska*, *supra*. A compact need not include any special recitation in order to prevent a groundwater loophole; a plainly applicable apportionment of substantive rights is enough. Here, the Compact's protection of Montana's first-tier rights against second- and third-tier diversions by Wyoming extends to all such diversions, including diversions accomplished by groundwater pumping.

Montana indicates that it intends to prove that such diversions occurred, by establishing the requisite hydrological connection between groundwater pumping and the removal of water from the Yellowstone River System. Br. 56 ("Montana generally agrees that the Compact does not address groundwater that does not affect water supply in Montana."). The complaint's allegation (at ¶ 11) that groundwater pumping is occurring "in violation of Montana's rights under Article V of the Compact" sufficiently incorporates that factual contention for purposes of this motion to dismiss.[11]

---

amount drawn from the Republican River as a result of groundwater pumping. See Final Report of the Special Master at 1, 6-7, *Kansas* v. *Nebraska*, 540 U.S. 964 (2003).

[11] Amicus Anadarko's factual prediction (Br. 15-16) that Montana will be unable to prove any such connection, at least as to some forms of groundwater pumping, is obviously not relevant at this stage.

C. More Efficient Use Of Water By Wyoming's Pre-1950 Users Does Not Violate The Compact

Montana's final allegation is that Wyoming users with pre-1950 rights are diverting the same amount of water for use on the same acreage, but consuming more of it and allowing less return flow back to the river system. See Compl. ¶ 12; Br. in Supp. of Compl. 15-16; Mont. Br. 47-49. Montana contends that this increased consumption through more efficient use amounts to post-1950 use that must yield to Montana's pre-1950 rights. Under the doctrine of appropriation as it existed in Wyoming at the relevant time, Wyoming's first-tier water users had the right to the full amount of the water they diverted to beneficial use, which could include water lost and returned to the river during the irrigation process. If those Wyoming users continued to divert the same amount of water, but used that water more efficiently and thus returned less water to the river, Wyoming law treated the more efficient use as within the original appropriative right. The Compact accordingly does the same. This allegation by Montana thus fails to support any claim of a Compact breach.[12]

---

[12] To be sure, if these users were devoting their diversions to acreage that they had not irrigated in 1950 (although they may have had a "paper" right to do so), the new use might be considered a post-1950 use under the Compact. See pp. 31-32, *infra*. Montana, however, alleges only that pre-1950 users are decreasing their return flows from "*existing* [as of 1950] irrigated acreage." Compl. ¶ 12 (emphasis added). The Court therefore need not reach Montana's argument (Br. 33-35) that the Compact protects pre-1950 rights only to the extent they were actually used in 1950: in this allegation Montana assumes that Wyoming users are *diverting* the same amount of water, but wasting less.

The Compact did not adopt a nondepletion principle that guaranteed a certain amount of water for Montana's first-tier rights as against Wyoming's first-tier rights; it did not quantify the appropriative rights existing as of January 1, 1950; and it did not impose any new limitations on such appropriative rights beyond those contained in each State's existing laws. See S. Rep. No. 823, *supra*, at 6. Article V(A) simply provides that first-tier rights "shall continue to be enjoyed in accordance with the laws"—presumably meaning the "laws" of each respective "signatory State"—"governing the acquisition and use of water under the doctrine of appropriation," and accordingly that they shall be protected to that extent against infringement by second- and third-tier diversions.[13]

As Wyoming explains (Br. 55-57), Wyoming law at the time of the Compact did not require an appropriator to use the same (or equally inefficient) irrigation technology, or to maintain his return flows at a constant level, in order to retain the priority of his water right. Under Wyoming law, "[n]o appropriator can compel any other appropriator to continue the waste of water which benefits the former." *Id.* at 57 (quoting *Bower* v. *Big Horn Canal Ass'n*, 307 P.2d 593, 601 (Wyo. 1957)).

Binning v. *Miller*, 102 P.2d 54 (Wyo. 1940), a pre-Compact case, is illustrative. An irrigator had for years

---

[13] Montana quotes a passage in the Senate Report stating that "[a]llocations, thereby, take into account *return flows and uses of them*, as well as original runoff." Br. 43 (quoting S. Rep. No. 823, *supra*, at 2); see also *id.* at 47. That passage discusses the allocation formula for third-tier water under Article V(C) based on water actually in the river during the accounting year. It has no bearing on the rights protected by Article V(A), which are defined by the state-law appropriation doctrine.

used an irrigation method that lost considerable water to seepage and waste. See *id.* at 58. That water ran downhill onto a neighboring property, where the landowner sought to appropriate it. See *id.* at 56-57. The irrigator subsequently built a dam to cut off the return flow across the neighbor's land and to use it to irrigate new land. See *id.* at 57. The Wyoming Supreme Court explained that "the general rule is still that seepage water belongs to the owner absolutely, so long, at least, as he can make beneficial use of it on the land for which it was appropriated." *Id.* at 61. That general rule did not apply in *Binning*, because the irrigator sought to divert the seepage to *new* acreage. See *ibid.* But here, on the facts alleged in Montana's complaint, the general rule *would* apply: a Wyoming user diverts only the water to which he has had a right since before the Compact, and irrigates only the acreage that he has irrigated since before the Compact. The user therefore has no obligation to maintain the return flows if he can put the water previously lost as seepage to the same beneficial use (here, irrigation) on the same land. See also 1 Wiel, *supra*, §§ 57-58, at 54, 56 (stating that "[w]aste water soaking [to another's land] after irrigation need not be continued," and noting that "the principle is entirely the same" for seepage), cited in *Binning*, 102 P.2d at 60.

2. Montana suggests (Br. 49) that these more efficient uses should be deemed second-tier rights under the first sentence of Article V(B). That sentence provides that in allocating the water that was "unused and unappropriated" at the time of the Compact, the first portion goes "to provide supplemental water *supplies* for the rights described in [Article V(A)]." 65 Stat. 666 (emphasis added). Neither the text nor the history of Article V(B) supports Montana's interpretation. See-

ond-tier rights are relevant only when a first-tier user's pre-1950 water right was insufficient to supply the existing irrigated acreage fully, and the user appropriated an additional supply after 1950 to supplement the existing right. The legislative history confirms as much. See S. Rep. No. 883, *supra*, at 7 (federal representative's report) ("[E]xisting irrigation developments with an inadequate *supply* should have a preferred right to the unused remainder over new projects.") (emphasis added); accord *id.* at 2, 11; H.R. Rep. No. 1118, *supra*, at 3.

Montana's allegation, by contrast, involves a water user who diverts no more water today, and irrigates no more acreage today, than he did in 1950; he simply *returns* less water and puts more of the diverted water to productive use on the same acreage. That more productive use does not mean that the 1950 water supply was inadequate; changing crops, for example, may cause more of the diverted water to be consumed rather than returned. Making more complete use of an unchanged diversion does not constitute drawing on a supplemental "supply."

Although this allegation by Montana fails to state a claim, it is presented as one of several alternative factual bases for Montana's claim of a Compact violation. Its deficiency, therefore, does not warrant granting the motion to dismiss.

CONCLUSION

The motion to dismiss the complaint should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

RONALD J. TENPAS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

WILLIAM M. JAY
Assistant to the Solicitor General

DAVID L. BERNHARDT
Solicitor

JOHN MURDOCK
Attorney
Department of the Interior

JAMES DUBOIS
K. JACK HAUGRUD
KEITH SANE
Attorneys

MAY 2008

APPENDIX A

YELLOWSTONE RIVER COMPACT COMMISSION
Engineering Committee
Billings, Montana

October 23, 1950

Mr. R. J. Newell
P.O. Box 1866
Boise, Idaho

Dear Mr. Newell:

At the joint meeting of the drafting and engineering committees of the Yellowstone River Compact Commission held in Billings, Montana on August 22-23, 1950, the engineering committee agreed to recommend a basis for the Yellowstone River Compact. This subject has been carefully considered by the committee, which herewith submits its report and recommendations.

It is a generally accepted fact that irrigation development in the Yellowstone River Basin, particularly on the interstate tributaries, has very nearly reached its maximum practicable limit without the provision of additional new storage capacity. The committee feels that clearing the way for this new storage should be the underlying objective of any interstate Compact. From an interstate standpoint, the situation in the Yellowstone River Basin is extremely favorable since on three of the four interstate tributaries there is a reservoir site at or near the State line which can provide adequate control of residual flows from the upper State for continued development in the lower State. The fourth tributary, Clarks Fork, is not likely to experience water shortage. The reservoir on Tongue River has already been constructed, and

those on the Big Horn River and the Powder River are authorized by Congress for construction by the Bureau of Reclamation. When these reservoirs are in operation they will have the practical effect of permitting full development in the upper States without affecting the progress of development in the lower States. The fact should be borne in mind.

Concerning treatment of existing developments in the Compact, the committee is of the opinion that there is little to be gained from a water supply standpoint by regulating and administering existing diversions under a Compact. It is, of course, entirely up to the Commission whether or not existing rights are to be administered under the Compact, but from an engineering standpoint, the committee feels that the expense and difficulties of such an administration would in no way justify the benefits that might be obtained. There are insufficient data upon which to base this type of administration due principally to differences in the water laws of the States involved. It would be a major research project to place existing rights in all States on an equivalent basis. Such procedure undoubtedly would involve interstate adjudication proceedings.

There are two principles upon which a satisfactory allocation of the unused waters of the Yellowstone River could be based. One is the so-called divertible flow principles, which has been used in previous Yellowstone River Compact attempts. The other is the depletion principle as used in the Upper Colorado River Basin Compact. The committee feels, that since the divertible flow principle has been previously used as a basis for a compact, it should be retained, but modified to make the apportionment operative on other than a daily basis so

that allocation could be in terms of cumulative volumes of water through an entire year, or portion thereof rather than by daily stream flow. This is because substantially all new development will be based on storage rather than direct flow. A suggested draft of an apportionment article is attached, together with the supporting definitions.

Whatever principle is used in allocating the water under the Compact, it is necessary to select some index upon which to base apportionment, either directly in acre-feet or by percentage. The committee believes that the most practicable basis of apportionment of the unused water is the area of irrigable land in the States. The irrigable lands in the States are tabulated in the report and the addendum, dated September 27, 1950, of the engineering committee. The committee feels the irrigable lands as shown by this report and addendum are a reasonable measure of the new development that is likely to take place in the basin for a long time to come.

If the Commission feels that the available data are insufficient on any of the interstate tributaries (Clarks Fork, Big Horn, Tongue, or Powder Rivers) to allocate all of the unused waters of that tributary, it could apportion a first block of water sufficient to take care of the presently indicated potential development.

Some consideration must be given to supplemental water supply and since such water is for use on existing projects, it is felt that such allocation should be made under the category of existing irrigation works rather than potential.

The committee definitely feels that there is enough information available at the present upon which to base a workable and realistic Compact, and that nothing would be gained but much might be lost if a Compact were postponed until all the development possibilities in the basin are completely and thoroughly studied. This will take a long time and cost a great deal of money, and if a Compact is delayed until it is completed, the basin may well be deprived of the use and benefit of many worth-while projects which otherwise could be constructed.

Sincerely yours,

(Signed)
Fred F. Buck

(Signed)
Earl Lloyd

(Signed)
J. J. Walsh

(Signed)
W. S. Hanna

(Signed)
Carl L. Myers

Attachment

Copy to: Each Commission Member
(with attachment)

APPENDIX B

YELLOWSTONE RIVER COMPACT COMMISSION

Minutes of Meeting
Oct. 24-25, 1950

The third meeting of the Yellowstone River Compact Commission was held at the Northern Hotel in Billings, Montana, on October 24 and 25, 1950, and was called to order at 10:05 a.m. by R. J. Newell, Chairman. Mr. Ed Parriott and Mr. Chris Josephson were announced as new Commissioners for Montana and Mr. Harry Littlefield as a new Commissioner from Wyoming.

The Chairman pointed out that the minutes of the second meeting had been distributed and asked if there were any corrections. Mr. Johnson moved that the minutes be approved. The motion was seconded and carried.

The Chairman outlined the general situation in which the Commission finds itself. Specific principles had not been adopted at the last meeting to guide Mr. Burke in the preparation of a work draft which he was requested to prepare and did prepare. Subsequently, the Drafting Committee met with the Engineering Committee, but no single draft of Compact was agreed upon.

The Chairman then called on Mr. Leonard for his views on the present status of the work of the Drafting Committee. Mr. Leonard reported that no meeting had been held, except the one early in August, when the Committee met with the Engineering Committee and advisors in Billings. At that time the basic principles were discussed, and it was agreed that Messrs. Leonard and McNally would each prepare a draft. The Commit-

tee was unable to agree on basic principles, and the Leonard and McNally drafts proved to be diametrically opposed at many points, with no basis for agreement. Mr. Leonard then discussed the history of Compact negotiations and spoke of a proposed compact prepared in 1935, signed by Messrs. Lamb, James, and Burritt. This proposed Compact was based on the doctrine of appropriation. Mr. Leonard then discussed the question of storage construction, mentioned the Wyoming-Nebraska-Colorado suit and its settlement on the basis of appropriation. He pointed out that the Supreme Court had left open in this suit the question of whether the United States owns the unappropriated water in the stream.

The Chairman then asked Mr. Acker for his views. Mr. Acker stated that the provision proposed with respect to North Dakota seemed to be agreeable to Montana and Wyoming. It applied to streams which were out of reach of Montana and Wyoming. He stated that he had reviewed a good many decisions of the Supreme Court and believed that the Court had laid down the firm proposition of "equitable apportionment," but had not laid down the specific principles for general application. He believed that the states could agree on a Compact and that they could better do justice to the area involved than could an authority or some other agency. He raised the question as to whether the Commission was attempting to apportion the natural flow only or whether its apportionment covered all the water, including stored water.

The Chairman then called on Mr. McNally. He said that he had before him three suggested drafts of Compact and that a fourth would be mentioned a little later. He discussed briefly the points of disagreement between

himself and Mr. Leonard with respect to the Tongue River. The first filing on the Tongue River in Wyoming was in 1879, and by 1886 there were filings on 45,000 acres. The first Montana filing was made August 9, 1886. The Wyoming Constitution provides that water arising in Wyoming belongs to the state. However, because of the interstate nature of the streams constituting the Yellowstone River system, the state may have to surrender some of its rights to this water.

Wyoming is trying to recognize existing rights. On the Tongue River it would have the first right to water for 45,000 acres. The water would then go to Montana, but for use 150 miles down stream. In the Laramie River case the Supreme Court held that it would protect junior rights where the economy was dependent thereon and where the distance to down stream point of use by senior rights would result in waste of water through channel loss. It held that a lower state should take advantage of storage possibilities and construction of storage works.

In application to the Tongue River situation Mr. McNally pointed out that the Tongue River Reservoir which has been constructed complied with the holding of the Court that storage possibilities should be developed. Mr. McNally then reviewed briefly the principal draft articles, Article V prepared by Myers, Article III by McNally and Wehrli, and Article III prepared by Leonard, which cover protection of existing rights and division of water. He then suggested hearing from the Engineering Committee.

Mr. Myers reported for the Engineering Committee that at the joint meeting held with the Drafting Committee in August two jobs were given to the Engineering

Committee. The first job was to analyze the situation on the Bighorn River to determine whether the "potential" and "possible" acreages given in the Engineering Report were correct, and if not to determine proper acreages. The Committee took a field trip in September covering the entire Bighorn River Basin and submitted its report, as an addendum to the original report, by letter of September 24, to the Chairman of the Commission.

The second job given the Committee was to attempt to prepare an article for inclusion in a draft of compact covering the apportionment of water. The Committee spent considerable time on this problem with the help of Mr. H. T. Person, Dean of Engineering at the University of Wyoming, and an Engineering Advisor to the Wyoming Commission, and Mr. J. R. Riter, Chief of Hydrology Division, Bureau of Reclamation. Two principles were considered for use in the preparation of the draft. The first is the depletion theory used in the Upper Colorado River Compact, which places a ceiling on the beneficial consumptive use of water permitted in each state. The second is the divertible flow theory which limits the amount or percentage of total amount of water which can be diverted in a state. The Committee believed that a modification of the divertible flow principle was most appropriate in this case, this being the principle considered in all previous compact negotiations on the Yellowstone.

Mr. Myers then read a letter to the Chairman of the Commission dated October 23, 1950, which discussed the opinion of the Engineering Committee in respect to this matter and transmitted a suggested draft of an apportionment article. Copies of the letter were distributed to those present. Mr. Leonard inquired whether the

draft prepared by the Committee proposed to affect existing rights or only unappropriated water. There was discussion by Messrs. Myers, Leonard, Bower, Vernon, Acker, Bunston, and others. Messrs. Bunston and Lloyd discussed the necessity for a compact before storage development could proceed.

At 11:30 a.m. the Chairman called a recess.

The Commission reconvened at 1:15 p.m.

Mr. Leonard moved that the report of the Engineering Committee be laid on the table. Mr. Acker questioned the advisability of tabling the report, and thus withdrawing it from consideration. He spoke of the need for a Compact, but the important matter for discussion was the division of water. Mr. Leonard's motion was withdrawn.

Mr. Acker moved that the October 23, 1950, report of the Engineering Committee be adopted and approved by the Commission. The motion was seconded by Mr. McNally. Mr. Jones stated that the Montana Commissioners would be willing to abide by the decisions reached at the February meeting. He suggested an examination of the Engineering Report in the light of these decisions. Mr. Bunston stated that the people on the Bighorn River in Montana did not agree to accept the acreages in the Engineering Report as a basis for the division of water, but would be willing to consider the report in arriving at proper percentages. He read a statement giving the position of the Bighorn people in Montana and objected to the inconsistent data as to "potential" and "possible" irrigable acreages in the Bighorn River Basin. Mr. Thornton suggested that the data presented by the Engineering Committee were probably as accurate as could be developed at this time and that they be used as a ba-

sis for division of water. There was discussion by Messrs. Bunston and Bower.

Mr. Myers outlined in some detail the method of derivation of data in the original report, the reasons why that report was felt to be inaccurate in some respects, the procedures followed by the Committee in modification, and the basis for the information in the addendum. There was discussion of certain details. Mr. Vernon outlined in general the plan of the Missouri River Basin Project for development on the Bighorn.

Mr. Acker questioned whether there was not some confusion as to which report was before the group for consideration and stated that his motion covered the October 23 report which suggested a basis for apportionment of the water and included as an attachment a draft article on apportionment.

Mr. McNally inquired what information Mr. Bunston and the Bighorn group from Montana would require in order to be able to agree on acreage figures.

There was discussion as to whether the Engineering Committee Report being considered by the group included the draft of Compact article. Mr. Leonard said that no Compact could be signed that asked Montana to give up rights to water now in use in Montana. Mr. Acker asked for a specific proposal, but Mr. Leonard replied that they would insist on recognition of the doctrine of appropriation.

There was discussion of the terms of the agreements reached in February, and whether they are still applicable. Messrs. McNally and Leonard agreed that the February provisions could still be adhered to, but there was some disagreement as to details.

Mr. Burke pointed out that the Report of the Engineering Committee contained 20 specific questions, and that it was not wise to try to consider the report as a whole without identifying the individual problems. He read particularly items in the third paragraph which contained problems 7 to 11. In this paragraph the Committee has made a recommendation as to the method of handling vested rights, a problem which will have to be solved by the Commission. Mr. Burke then discussed the claim of the United States to the water of interstate streams and the history of the claim and of court decisions which bear on the matter.

After a short recess Mr. Leonard thanked Mr. Burke for his discussion and suggested that he draft a suggested division of the water which could be presented to Montana and Wyoming, following which the Commission could meet and adopt the draft. Mr. Acker withdrew his motion with the consent of the second.

Mr. Acker moved that the Report of the Engineering Committee be adopted in principle only and that the points analyzed by Mr. Burke be considered individually. Mr. McNally seconded the motion. Mr. Newell asked Mr. Burke whether he now had adequate information from the Commission on which to base a draft of Compact. Mr. Burke stated that he had neither the information nor the time. The Chair called for a vote on the motion, and, Montana being opposed to the motion, it was declared lost.

There was discussion as to the basis for voting, and it was generally agreed that the vote must be taken by states, each state having one vote.

Mr. Acker moved that the Report of the Engineering Committee be received for consideration and possible

adoption of each of the principles stated. The motion was seconded by Mr. McNally and passed.

The items as identified by Mr. Burke in the Engineering Committee letter were considered as follows:

1. It is a generally accepted fact that irrigation development in the Yellowstone River Basin, particularly on the interstate tributaries, has very nearly reached its maximum practicable limit without the provision of additional new storage capacity.

It was moved and seconded to adopt this item, and the motion was carried.

2. The committee feels that clearing the way for this new storage should be the underlying objective of any interstate Compact.

It was moved and seconded that the item be adopted. Upon objection it was moved to amend the motion to insert the words, "one of" between "be" and "the" and change the word, "objective" to "objectives." The amendment was carried, and the motion as amended was carried.

3. From an interstate standpoint, the situation in the Yellowstone River Basin is extremely favorable since on three of the four interstate tributaries there is a reservoir site at or near the State line which can provide adequate control of residual flows from the upper State for continued development in the lower State.

4. The fourth tributary, Clarks Fork, is not likely to experience water shortages.

5. The reservoir on Tongue River has already been constructed, and those on the Big Horn River

and the Powder River are authorized by Congress for construction by the Bureau of Reclamation.

As to each of these items individual motions that the item be adopted were made, seconded, and carried.

6. When these reservoirs are in operation they will have the practical effect of permitting full development in the upper States without affecting the progress of development in the lower States. That fact should be borne in mind.

It was moved and seconded to adopt this item. Upon objection, it was passed over.

7. Concerning treatment of existing developments in the Compact, the committee is of the opinion that there is little to be gained from a water supply standpoint by regulating and administering existing diversions under a Compact.

This item was passed over.

8. It is, of course, entirely up to the Commission whether or not existing rights are to be administered under the Compact, but from an engineering standpoint, the committee feels that the expense and difficulties of such an administration would in no way be justified by the benefits that might be obtained.

9. There are insufficient data upon which to base this type of administration due principally to differences in the water laws of the States involved.

10. It would be a major research project to place existing rights in all States on an equivalent basis.

11. Such procedure undoubtedly would involve interstate adjudication proceedings.

Mr. Leonard stated that it is Montana's position that there should be a provision in the Compact that existing rights shall be administered under the Compact by the Administrative Commission that may be established. Mr. McNally stated that Wyoming did not want such a provision. There was discussion of the problem. It was agreed that both states want existing rights recognized in the Compact. Mr. Burke suggested recognizing existing rights and providing that they be administered under state law. There was discussion of the relative merit of the two positions from the standpoint of protection of property rights. Mr. Acker suggested adding a phrase to provide that the Compact would "recognize vested rights under the doctrine of appropriation." Mr. Vernon moved that with respect to item 8 of the Engineering Report the Commission desires that (a) the Compact recognize existing vested rights and (b) the procedure for recognizing these rights not be changed. There was no second.

Mr. Bower moved to adopt items 6 to 11 inclusive. Mr. Leonard stated that Montana objected. There was further discussion. Mr. Burke stated that there seemed to be no question about recognizing existing rights, that the question was what body would enforce those rights, the Courts or a Compact Commission. Items 6 to 11 were passed over.

12. There are two principles upon which a satisfactory allocation of the unused waters of the Yellowstone River could be based. One is the so-called divertible flow principle, which has been used in previous Yellowstone River Compact attempts. The other is the depletion principle as used in the Upper Colorado River Basin Compact.

13. The committee feels, that since the divertible flow principle has been previously used as a basis for a compact, it should be retained, but modified to make the apportionment operative on other than a daily basis so that allocation could be in terms of cumulative volumes of water through an entire year, or portion thereof rather than by daily stream flow. This is because substantially all new development will be based on storage rather than direct flow.

14. A suggested draft of an apportionment article is attached, together with the supporting definitions.

There was discussion of the item. Mr. Thornton moved to adopt the divertible flow principle as modified in accordance with Committee recommendations. The motion was seconded. Mr. Leonard stated that he favored the divertible flow principle, but objected to modification. In the following discussion Wyoming proposed leaving the question of modification open for the present. By consent the group adopted the divertible flow principle as a basis for Compact, modification to be considered later.

15. Whatever principle is used in allocating the water under the Compact, it is necessary to select some index upon which to base apportionment, either directly in acre-feet or by percentage. The committee believes that the most practicable basis of apportionment of the unused water is the area of irrigable land in the States.

16. The irrigable lands in the States are tabulated in the report and the addendum, dated September 24, 1950, of the engineering committee.

17. The committee feels the irrigable lands as shown by this report and addendum are a reasonable measure of the new development that is likely to take place in the basin for a long time to come.

Mr. Bunston objected to the irrigable land figures on the Bighorn as given in the Committee Report and addendum. It was moved to adopt the principle of using "potential" and "possible" irrigable land as the index to determine the percentage apportionment. There was no second. It was moved to adopt item 17. The motion was seconded. Following discussion, it was moved to add after the word, "addendum" the expression, "except as to the Bighorn River." The motion was seconded and carried, and the motion as amended was carried.

18. If the Commission feels that the available data are insufficient on any of the interstate tributaries (Clarks Fork, Big Horn, Tongue, or Powder Rivers) to allocate all of the unused waters of that tributary, it could apportion a first block of water sufficient to take care of the presently indicated potential development.

This item was passed over.

19. Some consideration must be given to supplemental water supply and since such water is for use on existing projects, it is felt that such allocation should be made under the categoryof existing irrigation works rather than potential.

It was moved and seconded that this item be adopted, and the motion was carried.

20. The committee definitely feels that there is enough information available at the present upon which to base a workable and realistic Compact, and

that nothing would be gained but much might be lost if a Compact were postponed until all the development possibilities in the basin are completely and thoroughly studied. This will take a long time and cost a great deal of money, and if a Compact is delayed until it is completed, the basin may well be deprived of the use and benefit of many worth-while projects which otherwise could be constructed.

This item was read as a statement, but not put as a question.

The meeting recessed at 5:45.

The meeting reconvened at 8:35 p.m. Mr. Leonard discussed the numerous meetings of the Commission that have been held and the numerous drafts of compacts. He stated that the draft prepared by Messrs. McNally and Wehrli and presented by Wyoming was wholly unacceptable to Montana and gave the reasons therefor. He concluded that the Commission was not approaching agreement and stated that if the Commission could not come nearer agreement, he was prepared to move that the Commission adjourn permanently.

Mr. McNally pointed out that the McNally-Wehrli draft is not before the group, that it is the Engineering Committee's draft which is before the group. The Chairman brought up for consideration the Engineering Committee's draft and asked Mr. Burke to conduct the discussion. Mr. Burke outlined the provisions of the draft article and proceeded to take up the article by sections.

There was agreement on the first paragraph of the article, reading as follows:

"The waters of the Yellowstone River System, exclusive of existing development and other uses coming within the provisions of paragraph C of this Article __, are hereby allocated to each State for storage or direct diversion as follows:

Clarks Fork River

To Wyoming ____%
To Montana ____%

Big Horn River

To Wyoming ____%
To Montana ____%

Tongue River

To Wyoming ____%
To Montana ____%

Powder River

To Wyoming ____%
To Montana ____%

subject to the following stipulations concerning the point of measurement:"

The provision as to point of measurement on Clarks Fork was agreed on as follows:

"1. For the Clarks Fork River the point of measurement shall be below the last diversion from Clarks Fork River above Rock Creek."

There was discussion as to the point of measurement on Bighorn River, as to which the Committee's draft provided as follows:

"2. For the Big Horn River the point of measurement shall be below the last diversion from the Big

Horn River and the inflow from the Little Big Horn River shall be excluded from the quantity of water subject to allocation."

Mr. Bunston suggested that the point of measurement be at a point at the state line or at a point just above the Little Bighorn River. Mr. Leonard objected to measurement for division except at the state line on any tributary and also objected to excluding existing rights.

Mr. Burke discussed the preparation of the report by the Committee, on which the state engineers of the three states constitute a majority. He expressed his feeling that the group should have confidence in the report representing the best judgement [*sic*] of the three state engineers who are men of long experience and high standing. He urged that the engineering matters discussed in the report and recommended by the Engineering Committee not be tampered with by the group. There was restatement of suggestion by Mr. Leonard. Mr. Person pointed out that the Commission is attempting to divide the entire water produced in the basin, not just the water produced in Wyoming.

Mr. Acker inquired of Mr. Leonard precisely what the problems were that called this Compact negotiation. Mr. Kurtz spoke of the history of a previous compact and its consideration. He pointed out the importance of drafting a compact and having it approved and some of the problems to be resolved.

Mr. Bunston agreed that the problem is one of dividing the water of the basin, not just that which arises in Wyoming. As to the division of the water, he believed that a "block" division can be effective—probably the first block on the basis of the engineering report and the remaining block, after serving existing and potential

irrigation, to be subject to appropriation by both states. As to the point of measurement, he suggested that it be at the Hardin Bridge just above the mouth of the Little Bighorn River.

Following a review by Mr. Burke of Mr. Bunston's proposal, there was a discussion of the proposal by Messrs. Vernon, Bunston, and Burke. Mr. Burke stated the proposition that "potential" developments be divided on the basis of acreage in the engineering report, and that "possible" acreage be included but percent not stated.

Mr. Bunston moved that the group favor compacting unappropriated water on the divertible flow theory using for percentages as to potential acreages the figures in the engineering report, and as to possible acreages, figures to be determined later. Mr. McNally seconded the motion. There was an objection by Mr. Leonard as to adopting this motion. Mr. Bunston suggested that the question as to the theory proposed be subject to further consideration.

There was discussion as to the point of measurement and the relationship between various points of measurement and percentages apportioned. On a question by Mr. Bunston, Mr. Burke stated as his opinion that the draft article by the Engineering Committee was the best method of accomplishing the development of the area. There was further discussion of the recognition of existing rights.

Mr. Thornton moved that the Engineering Committee Report be tentatively adopted as to measuring points on all streams. The motion was seconded. Mr. Leonard objected. Mr. Jones spoke of the problem of voting—the necessity of the Commissioners from a state

voting as a unit. He expressed regret that the Montana group had not met to agree on various points. He stated that Montana will insist on recognition of Doctrine of Appropriation and some method of caring for periods of low flow.

Mr. Thornton asked to recess to the next morning. Mr. Leonard again stated his proposal that unless Wyoming suggested some other basis for a compact, there appeared to be no basis for agreement. Mr. McNally again stated that no Wyoming proposal is before the Commission, that Wyoming will be satisfied with any one of several paragraphs submitted providing for the apportionment of water. Mr. Williams stated that he was tired of hearing the discussion apparently getting nowhere and was going to leave. It was moved and seconded to recess. The motion was carried and at 11:00 p.m., the Commission recessed until the next morning.

The meeting reconvened at 9:40 a.m. on October 25, 1950. Mr. Newell asked whether further discussion of the Engineering Committee's Report was desirable. The tentative approval such as had been given the specific items of the report would hardly bind a Commissioner to sign the compact when prepared.

Mr. Bunston read a letter addressed to Mr. Newell, copy of which is attached.

There was discussion of the method of division of Bighorn River waters. It was pointed out that there was substantial agreement on potential irrigation possibilities on the Bighorn as presented in the Engineering Committee's Report.

Mr. Leonard stated that he could not agree to Mr. Bunston's proposal to turn over to the Engineering

Committee the problem of drafting a compact for the signature of the Commissioners nor to the suggestion that laymen on the Commission be supplanted by engineers. Mr. Bunston stated that he did not by any means intend to imply any requests for the resignation of any members of the Commission. His comments were submitted in view of the nearness of the legislative sessions in Wyoming and Montana, and because of the fact that the job of drafting the compact was largely a technical engineering job. Mr. Williams stated that although he had no official status in the meeting he wished to offer as his opinion that he agreed with Mr. Bunston. The Engineering Committee should be capable of drawing a compact. If it were then found not satisfactory it could be reviewed in the legislatures.

Mr. Cochrane asked whether all the tributaries needed to be considered in a draft or whether a compact could be drawn covering some streams and omitting others. He stated that the Bighorn River group wants a compact so that it can go ahead with developments even if some of the tributaries can not agree on compact provisions.

Mr. Jones asked for a statement from Wyoming as to some specific proposals to which they felt Montana might agree. Ten minutes recess was taken. Following the recess Mr. Leonard called attention to the fact that North Dakota was not represented in this day's sessions and that no action was possible without them. He hoped that Wyoming would submit a draft of a compact which would be agreed upon. No agreement can be reached on dividing the basin and compacting individual streams. The basin must be covered as a whole.

Mr. Bunston stated that he was not in favor of adjourning or having anybody resign. If it is found that a compact can not be drafted to cover all the tributaries he would like an opportunity to see what can be done on the Bighorn.

Mr. Newell discussed the various drafts which were available for consideration. No one draft had been submitted by the Drafting Committee. Mr. Burke had prepared a preliminary work draft for the use of the Drafting Committee. Messrs. McNally and Wehrli had prepared a draft representing a Wyoming view. Mr. Leonard had prepared a draft representing his views. Copies of the Leonard and Burke drafts were distributed.

Mr. Lloyd moved to recess into river groups to try to reach agreement and report back shortly after noon. There was no second. Mr. Leonard asked what Wyoming thought of the Burke draft. He stated that he felt it covered the agreements reached in February but that it should cover the manner of settling disagreements in questions of interstate administration. Mr. Bunston moved to consider the Burke draft paragraph by paragraph.

Mr. McNally referred to the draft paragraph in the Engineering Committee's Report and to corresponding paragraphs in the Leonard draft, McNally-Wehrli draft and a Myers draft. He stated that Wyoming would not agree to interstate administration. He read from the draft paragraph by the Engineering Committee and stated that Wyoming wanted division of the water on an annual basis as provided for in this draft. He then read from a paragraph of the Myers' draft which used as a basis for division of water the allocation of beneficial consumptive use on an annual basis, October to Septem-

ber, placing a ceiling on the amount of water which can be consumptively used in each of the states. He read from the McNally-Mehrli draft which also provided for division on the consumptive use basis and from the Leonard draft which provided for the application of the Doctrine of Appropriation on an interstate basis. Mr. McNally stated that he objected to interstate administration. He stated that he would insist on "equitable apportionment" which includes priorities and other factors. He stated that if agreement could be reached on the language to be used in the article, of which he read from several examples, and on the question of interstate administration, then agreement could be reached on a compact.

In answer to a question Mr. Newell explained that the Myers draft was a draft prepared by Mr. Myers utilizing as a basis the Burke draft and substituting in the appropriate place the principle of apportionment on the basis of consumptive use rather than apportionment of divertible flow. This draft was prepared for the use of the Engineering Committee. Copies were furnished only to members of that Committee. When the Committee considered the draft it leaned toward the divertible flow method and prepared its own draft which was presented to the Commission.

Mr. Jones agreed that the basis of division of water is the essential feature to be decided. He felt that there should be some machinery for discussion of problems which would arise under the compact either through a Commission, through the state engineers or by some other means which should be provided for in the Compact.

Mr. Leonard insisted that under the Doctrine of Appropriation state lines must be wiped out. He insisted on recognition of established rights under interstate administration, and on apportionment of natural flow, not storage.

Mr. McNally moved to remove the Tongue River from compact consideration and let the Commission proceed to consider the Bighorn, Powder and Clarks Fork. Mr. Kurtz seconded the motion. The Chairman called for discussions. Mr. Kurtz discussed the situation existing on the Tongue River which results in problems differing from those on the other tributaries and may necessitate excluding the Tongue from consideration. He called attention to a portion of Mr. Leonard's draft relative to the division of water and particularly the statement reading ". . . in accordance with the general law governing the acquisition and use of water . . ." He pointed out additional language in the draft which it seemed to him tended to modify or restrict this statement and called attention to the importance of agreeing on major items and delegating to others the resolution of details.

Mr. Leonard discussed some of the questions raised. He spoke particularly of previous proposals to exclude the Tongue River and read from a letter prepared in 1945 pointing out in detail reasons for not excluding the Tongue. There was discussion between Messrs. Kurtz and Leonard relative to points of agreement and disagreement on the Tongue River.

In response to comments relative to having the courts, not a Commission, determine certain matters of Administration, Mr. Muggli stated that he wanted to avoid law suits if possible, that he was a practical irri-

gator and believed that from the standpoint of a practical irrigator the question of dividing water between upstream and downstream users could be resolved on a friendly basis.

Mr. Vernon suggested that there seemed to be some basis for agreement which should be explored.

At 11:45 a.m. the meeting recessed.

The meeting reconvened at 1:50 p.m. Mr. McNally spoke on the general subject of administration of the compact. He stated that Wyoming did not want a "super-government" and control by two non-residents such as might occur with a board of three persons. He stated that in his opinion Article VI of the Snake River Compact presented a satisfactory form, with modifications to suit the differing situation. This article in its unmodified form is as follows:

> "C. In the case of failure of the administrative officials of the two States to agree on any matter necessary to the administrationof this Compact, the Director of the United States Geological Survey, or whatever official succeeds to his duties, shall be asked to appoint a Federal representative to participate as to the matters in disagreement, and points of disagreement shall be decided by majority vote."

Mr. Newell asked Mr. Vernon whether he considered that a U. S. Geological Survey representative, as suggested in the Snake River Compact was a logical person for Federal representative. Mr. Vernon stated that he did; that he felt it should not be a Bureau of Reclamation representative because of the Bureau's direct interest in projects with respect to which decisions on administration of the stream would be made. Mr. Leonard stated

that he preferred the Bureau of Reclamation representative, but suggested that nothing be placed in the Compact which would restrict the judgment of the President in making an appointment. He suggested that North Dakota not be a part of the administrative body, there being little opportunity for controversy involving North Dakota.

Mr. McNally objected to the provision that the Commission might change the apportionment as provided for in a portion of Article IV of the Leonard draft reading as follows:

> "From time to time the Commission between Wyoming and Montana shall re-examine the allocations herein made and upon unanimous agreement may make modifications therein as are fair, just and equitable, giving consideration among other factors to:
>
> Priorities of water rights;
>
> Acreage irrigated;
>
> Acreage irrigable under existing works; and
>
> Potentially irrigable lands."

Mr. Leonard suggested that the language be changed to provide that the Commission might "recommend" modification. There was general agreement. Mr. Leonard stated that he had been told by Mr. Acker that North Dakota was agreeable to not being represented on the administrative commission.

Mr. Thornton suggested that the Engineering Committee should be given an opportunity to hear the ideas of the group on specific articles of a compact in order to be in a position to draft a compact.

The Chairman called for a vote on the motion to exclude the Tongue River. The motion was lost. There was discussion of whether the Engineering Committee should be asked to draft a compact. Mr. Bower moved that the Commission ask the Engineering Committee, with the advice and assistance of Mr. Burke, to prepare a draft of proposed compact for presentation at an early date. The motion was seconded and carried. Mr. Leonard stated that he agreed that the Engineering Committee might properly draft a compact if given adequate instructions but he did not want the Committee to undertake this task if it was permitted to insert its own ideas of policy.

Mr. Bower moved that the Commission consider the Burke draft. The motion was seconded and carried. There was no objection with respect to the preamble or Article I.

Article II: It was suggested that unnecessary definitions be excluded at the discretion of the Committee. It was agreed that in Article II, (C), (D), and (F) where necessary the Little Bighorn River should be expressly excluded from the compact. It was pointed out that tributaries lying within Yellowstone Park must also be excluded. The type of instructions to be given to the Committee were discussed. Mr. Myers asked specifically whether the Commission wanted to operate on a daily basis or on an annual basis, subject to check as required. Mr. Bower moved to have operations on an annual basis with provisions to make a check at any time desirable, but not required on a daily basis. The motion was seconded. In respect to a question, Mr. Buck stated he agreed to the annual basis with provision to check as required. The motion was passed.

Article II (J), (K): To be dropped.

Article III: Mr. Leonard suggested substituting Article IV of his draft for Article III of the Burke draft. Article IV of the Leonard draft was read by paragraphs and discussed. It was agreed to modify the first paragraph beginning after the comma in the eighth line so that the balance of the paragraph would read as follows:

> "and one representative selected by the director of the Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency to be appointed by him at the request of the states to sit with the Commission, and who shall, when present, act as Chairman of the Commission without vote except as herein provided."

The second, third, fourth, fifth, and sixth paragraphs of the article were approved. It was moved, seconded and carried that the seventh paragraph be omitted and the same action was taken in respect to the eighth paragraph. The ninth paragraph was approved as previously amended to provide that the Commission might recommend modification in allocation. The tenth and eleventh paragraphs were approved. It was moved, seconded, and carried that Article IV of the Leonard draft as changed, be substituted for Article III of the Burke draft. It was moved, seconded, and carried that old Article III (D) of the Burke draft be added to the new Article III (modified Article IV of the Leonard draft).

Article IV of the Burke draft was approved.

Article V: It was suggested that the article in the Engineering Committee report be substituted for Article V. There was discussion on this article and of Article III of the Leonard draft, principally paragraph 2 there-

of. There was discussion of the language, the theory of Doctrine of Appropriation, and whether adding separate reference to the use of priorities in single streams regardless of state lines materially affected the sense of the paragraph. Mr. Leonard moved that paragraph 2 of Article III of the Leonard draft, with suggested modifications, be substituted for Article V of the Burke draft. The motion was seconded and after discussion, withdrawn. Mr. Bunston moved that the Engineering Committee should use in its draft the language in the Burke draft which appears as the first paragraph under the discussion of Tongue River, for each of the interstate tributaries included in the Compact, with this amendment: to strike the period after "appropriations" add a comma and "including the principle of priority, regardless of state line". Motion was seconded by Mr. Jones. There was discussion following which the motion was modified to eliminate the amendment to the language. The motion was passed.

It was moved, seconded, and carried to include as a separate article of the Compact, the following:

> "No sentence, phrase, or clause in this Compact, or in any provision thereof, shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact."

Article V (D): It was agreed that the percentages agreed to in February, and with respect to the Bighorn. determined from the addendum to the engineering report, would be used.

Article VI: Agreed to eliminate.

Article VII: Mr. Humpherys read the following language which he had been authorized by the Commissioner of the Bureau of Indian Affairs to propose.

> "Nothing contained in this compact shall be so construed or interpreted as to affect adversely any rights to the, use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian Tribes and their reservations."

It was moved, seconded, and carried that the language be adopted.

Article VIII to end: Accepted.

Following discussion of Article XI, it was moved to adjourn subject to call of the Chairman. It was agreed that about two weeks would be allowed for study after the draft of Compact had been sent to the Commissioners. The motion was seconded and carried and the meeting adjourned at 5:55 p.m.

O. C. Reedy
Secretary

["Approved: R. J. Newell, Chairman
December 7, 1950"]

ATTENDANCE RECORD

October 24-25, 1950

Montana

Commissioners

Fred E. Buck

H. W. Bunston

John Herzog

Ashton Jones

A. Wallace Kingsbury

P. F. Leonard

Joseph Muggli

Ed F. Parriott

Keith W. Trout

Others

Wayne W. Linthacum

H. A. Williams

North Dakota

Commissioners

L. A. Acker

Einer Dahl

J. J. Walsh

Wyoming

Commissioners

Earl T. Bower

Ben F. Cochrane

E. C. Gwillim

E. J. Johnson

N. V. Kurtz

H. L. Littlefield

R. E. McNally

Mark H. Partridge

L. F. Thornton

Dr. M. B. Walker

Wyoming

Others

Earl T. Lloyd

H. T. Person

Others

R. J. Newell	–	Chairman, Federal Representative
O. C. Reedy	–	Secretary
C. L. Myers	–	Chairman, Engineering Committee—Bureau of Reclamation
W. S. Hanna	–	Member of Engineering Committee

W. J. Burke	–	Bureau of Reclamation
K. F. Vernon	–	Bureau of Reclamation
C.T. Judah	–	Bureau of Reclamation
Geraint Humpherys	–	Bureau of Indian Affairs
Firman H. Brown	–	Bureau of Indian Affairs
John G. Lightfoot	–	Corps of Engineers
D.F. Clemans	–	for D. F. Burroughs, National Park Service
E. L. Doeling	–	Fish & Wildlife Service
J. S. James	–	for Kirk. Sandals, SCS
J. Elliot Hall	–	Bureau of Land Management
R. A. Bethune	–	Reconstruction Finance Corp
R. E. Bodley	–	Adm. Assistant to U.S. Senator Zales N. Ecton